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No. 98-___

In The

Supreme Court of the United States

October Term, 1997

DAVID R. McKUNE, Warden,
CHARLES SIMMONS, Secretary of Corrections,

Petitioners,

v.

MARK L. STELTZLEN,

Respondent.

On Petition For A Writ Of Certiorari To The Kansas Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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HIPP

QUESTIONS PRESENTED

1. Is a state department of corrections regulation that implements a statutory directive that all good time credits "shall be awarded on an earned basis" a "law" for *ex post facto* purposes?

2. Does a state department of corrections regulation that changes the awarding of good time credits from "a projected basis" to "an earned basis", as required by the controlling statute and solely for purposes of determining an inmate's conditional release date, without any negative impact on credits accumulated prior to the regulation's effective date nor the total amount of credits available, violate constitutional *ex post facto* principles?

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OPINIONS BELOW

The September 5, 1997, decision of the Kansas Court of Appeals, holding that an administrative regulation changing good-time credits from presumptively earned to actually earned for purposes of calculating conditional release dates violates constitutional *ex post facto* principles is unpublished, see 944 P.2d 197 (1997) (table of cases), but is included as Appendix A. The unreported July 9, 1998 order of the Kansas Supreme Court denying the petitioners' request for review of the Court of Appeals decision is included as Appendix B.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Kansas Court of Appeals is invoked pursuant to 28 U.S.C. § 1257(a). The Kansas Court of Appeals issued its decision in this case on September 5, 1997, the Kansas Supreme Court denied review of that decision on July 9, 1998, and this petition has been filed within ninety days of the latter date as required by Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *Ex Post Facto* Clause applicable to the States provides that

> "No State shall . . . pass any . . . ex post facto Law. . . . U.S. Const. Art. I, § 10.

Kansas Statute Annotated (K.S.A.) § 22-3718 provides in part that an inmate's conditional release date is

> the inmate's maximum term or terms, less such work and good behavior credits as have been earned. . . .

K.S.A. § 22-3725(d) provides that

> Good time credits shall be awarded on an earned basis pursuant to rules and regulations adopted by the secretary of corrections.

The Kansas Administrative Regulation ("K.A.R.") invalidated in this case, K.A.R. 44-6-142, provides as follows:

> When computing the conditional release date, it shall be presumed that prior to March 1, 1995, 100% of the available good time credits were earned. On and after March 1, 1995, good time credits shall be awarded *on an earned basis* pursuant to K.A.R. 44-6-124 for the purpose of determining the conditional release date. K.A.R. 44-6-142 (1995) (emphasis added).

The prior version of the regulation, effective when respondent was convicted and sentenced, provided that

> When computing the conditional release date, it shall be presumed that 100% of the available good time credits has been earned, and the good time credits shall be applied *on a projected basis*. K.A.R. 44-6-142 (1991) (emphasis added).

STATEMENT

Procedural History

Respondent, Mark L. Steltzlen, incarcerated in 1990 under a 15- to 20-year sentence for aggravated robbery, filed this state post-conviction action in Kansas district court, alleging that an amendment to the Kansas Department of Corrections regulation regarding the awarding of good time credits for purposes of determining an inmate's conditional release date violates constitutional *ex post facto*-principles. The trial court agreed with respondent's contention and ruled in his favor. On September 5, 1997, the Kansas Court of Appeals affirmed. Appendix A.

On July 9, 1998, the Kansas Supreme Court denied review of the Kansas Court of Appeals' decision in this case, Appendix B, after contemporaneously deciding two other inmate cases raising similar or identical *ex post facto* challenges in favor of the inmates and denying petitioners' requests for rehearing of those decisions. *See Bankes v. Simmons, et al.*, No. 98-___, and *Stansbury v. Hannigan, et al.*, No. 98-___ (petition for writs of *certiorari* filed simultaneously with this petition for a writ of *certiorari*). The Kansas Supreme Court denied petitioners' request for recall of the mandates in this case and the decisions mentioned above pending proceedings in this Court. Appendix C. Petitioners are filing simultaneously with this petition an application for a stay of the Kansas courts' decisions in these cases with Justice Breyer, Circuit Justice for the Tenth Circuit.

Statement Of Facts

1. *The Kansas Statutes And Administrative Regulations Concerning Good Time Credits And Conditional Release Dates*

In Kansas, the awarding of good time credits is authorized by statute. *See* K.S.A. § 22-3725. Some details of how such credits are earned, awarded, forfeited, withheld and accumulated are included in the statute, but the statute also provides that "[g]ood time credits shall be awarded on an earned basis pursuant to rules and regulations adopted by the secretary of corrections." *Id.* at § (d).

The earning, awarding, forfeiting, withholding and accumulation of good time credits affect two important dates for inmates: (1) an inmate's parole eligibility date; and (2) an inmate's conditional release date. The parole eligibility date is, as its name suggests, the date on which an inmate first becomes eligible to be considered for parole. In Kansas, that date is the "entire minimum sentence imposed by the court, less good time credits." K.S.A. § 22-3717(a). The conditional release date, on the other hand, is the date on which an inmate is entitled to be released from incarceration. Conditional release is "the inmate's maximum term or terms, less such work and good behavior credits as have been earned." K.S.A. § 22-3718; *see generally Beck v. Kansas Adult Authority*, 241 Kan. 13, 29-30, 735 P.2d 222, 234-35 (1987).

These important dates, when the inmate is serving an indeterminate sentence less than life imprisonment, are calculated by deducting good time credits from the minimum and maximum terms of imprisonment respectively.

Thus, the parole eligibility date for an inmate like Steltzlen serving a 15- to 20-year sentence is calculated by deducting good time credits from 15 years, while the conditional release date is calculated by deducting good time credits from 20 years.

With respect to conditional release dates, the Department of Corrections regulation in effect at the time the respondent in this case committed his crime, was convicted and sentenced provided that "it shall be presumed that 100% of the available good time credits has been earned, and the good time credits shall be applied on a projected basis." K.A.R. 44-6-142 (1989); *see also* K.A.R. 44-6-108(c) (1989). This meant that, solely for purposes of calculating the conditional release date, the instant an inmate entered prison the inmate was presumed to have earned 100% of the available good time credits. So, in the preceding example, if the available good time credit on a 20-year sentence was 10 years, the inmate's conditional release date would be 10 years from the date of incarceration, and that date would be established the day the inmate entered the prison. In 1995, however, the Department of Corrections amended the regulation to provide that

> When computing the conditional release date, it shall be presumed that prior to March 1, 1995, 100% of the available good time credits were earned. On and after March 1, 1995, good time credits shall be awarded *on an earned basis* pursuant to K.A.R. 44-6-124 for the purpose of determining the conditional release date. K.A.R. 44-6-142 (1995) (emphasis added).

What is undisputed and unchanged about good time credits in Kansas is that the relevant statutes have not changed and the total amount of good time credits available to shorten conditional release dates is unchanged. Only if the respondent engages in misconduct after the effective dates of the regulatory changes discussed above, as he has, will his conditional release date be any different than it would have been under the regulatory scheme in effect when he committed his crimes, was convicted and sentenced. Unlike the petition for writs of *certiorari* in *Bankes v. Simmons, et al.*, No. 98-___, and *Stansbury v. Hannigan, et al.*, No. 98-___ (filed simultaneously with this petition), which also involve issues regarding parole eligibility dates, this case involves an *ex post facto* challenge only to the regulation governing the calculation of conditional release dates.

2. *Mark L. Steltzlen and These Proceedings*

Mark Steltzlen was convicted of aggravated robbery and sentenced to a term of 15 to 20 years imprisonment in 1990. App. 2a. As noted previously, administrative regulations in place in the Kansas prisons in 1990 presumed that, for purposes of determining conditional release dates, all available good time credits were earned on a projected basis. Thus, Steltzlen's conditional release date was May 17, 2000, 10 years from the day his sentence began.

After the 1995 amendment to the regulation, which required that all good time credits toward conditional release be earned after March 1, 1995, prison officials credited Steltzlen only for all possible good time up to

March 1, 1995, altering his conditional release date to August 3, 2005. If Steltzlen earned all available good time credits after March 1, 1995, ultimately his conditional release date still would be May 17, 2000. He has not done so, however, and thus his conditional release date remains later than May 17, 2000, although not as late as August 3, 2005. At the time the Court of Appeals decided this case, Steltzlen's conditional release date was October 17, 2004.

3. *The Kansas Court of Appeals' Decision*

The Kansas Court of Appeals began its *ex post facto* analysis by citing and quoting this Court's decision in *Weaver v. Graham*, 450 U.S. 24 (1981), for the proposition that " 'two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.' " App. 14a (quoting *Weaver*, 450 U.S. at 29). The court first considered whether the constitutional *ex post facto* prohibition applies to prison regulations, as opposed to legislative enactments, but concluded that, at least in Kansas, it does. The court reached this conclusion by relying upon the proposition that "[p]olitical subdivisions of a state, or quasi-legislative instrumentalities, exercising delegated legislative power are within the ambit of the ex post facto clause." App. 15a (quoting 16A C.J.S., *Constitutional Law* § 409, p. 355). The court deemed this proposition "an appropriate approach in Kansas"

where properly promulgated regulations are deemed to have the force and effect of law. App. 15a.[1]

The court then turned to the issue whether the change in calculating conditional release dates is retrospective. Citing *Weaver*, which involved an *ex post facto* challenge to a statutory reduction in the number of good time credits awarded automatically to Florida inmates, the court of appeals opined that "[i]t is the effect of the law that determines whether it is *ex post facto*. App. 15a. The court observed that *Weaver* declares that an *ex post facto* finding does not depend on the existence of vested rights (which good time credits are not) and that the retrospectivity issue is decided by asking whether the statute in question applies to prisoners convicted for acts committed before the statute's effective date. App. 16a. If it does, as the regulation does with respect to Steltzlen, then the change is retrospective.

The court then addressed the second requirement of *Weaver* – whether the change in the law disadvantaged Steltzlen. The court pointed out that this Court in *Weaver* rejected the argument that the reduction in the amount of automatic good time credits Florida inmates received for good conduct was offset – for *ex post facto* purposes – by

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[1] There is an acknowledged split of authority in the Courts of Appeal and state courts on the question whether prison regulations are "laws" for *ex post facto* purposes. *See Bailey v. Noot*, 503 U.S. 952 (1992) (White, J., dissenting from the denial of *certiorari*); *Dominique v. Weld*, 73 F.3d 1156, 1162 & n. 10 (1st Cir. 1996) (noting the continuing split of authority); *see also Miller v. Florida*, 482 U.S. 423, 434 (1987) (observing that numerous lower federal courts have refused to apply the *Ex Post Facto* Clause to revisions in the *federal* parole guidelines).

new opportunities to earn equal or even greater good time at prison officials' discretion. App 16a-17a. Instead, this Court reasoned that Florida inmates were disadvantaged by the change because, even if they obeyed all prison regulations and completed all work assignments, the automatic credits they received would be reduced and they could only make up the difference by satisfying extra conditions that previously had not existed. 450 U.S. at 35.

The Kansas Court of Appeals decided that the same was essentially true in this case. Under the original regulation, Steltzlen was presumed to have earned all good time credits available against his 20-year maximum sentence (on the day he entered prison) and could lose them only by forfeiture as a punishment for disciplinary infractions. Under the new regulation, Steltzlen is required to actually earn all good time credits after March 1, 1995. In the court's view,

> [t]his is similar to the situation in *Weaver* where the statutory changes enacted there required the inmates to do something extra and to subject themselves to the discretion of the prison in order to gain the same level of early release advantage accorded under the old statute. App. 18a.

The court of appeals also opined that the new regulations "reach back and take away what was already given to Steltzlen . . . and, accordingly, have a disadvantageous retrospective effect on him." App. 18a (citing *Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891 (1997) (invalidating on *ex post facto* grounds the retroactive cancellation of good

time credits awarded to alleviate prison overcrowding that already had been used to obtain release).

Lastly, the court rejected the argument that the new regulations simply effectuate the statutory directives that good time credits toward conditional release shall be "earned." *See* K.S.A. §§ 22-3718, 22-3725. The court instead read this Court's decision in *Lynce v. Mathis* to direct that courts ignore purpose or intent in *ex post facto* cases and focus solely on the effect of the disputed changes. App. 19a. Thus, although the court admitted that the new regulation is entirely faithful to the statutory directives regarding conditional release, it concluded that the new regulation violates *ex post facto* principles because "it will put inmates like Steltzlen at a disadvantage." App. 19a.

REASONS FOR GRANTING THE WRIT

The two questions presented in this case are identical to Questions 1 and 2 in the petition filed simultaneously with this case in *Hannigan, et al. v. Stansbury*, No. 98-___, and *Simmons, et al. v. Bankes*, No. 98-___. For that reason, petitioner respectfully refers the Court to the full discussion of the reasons for granting *certiorari* review in that petition and incorporates that discussion by reference in this petition.

I. The Kansas Court Of Appeals' Decision Is Contrary To Decisions Of Federal Courts Of Appeal And State Courts Of Last Resort

A. The Lower State And Federal Courts Have Divided Over What Regulations Affecting Inmates Are "Laws" For *Ex Post Facto* Purposes And What Changes Affecting Good Time Credits Violate Constitutional *Ex Post Facto* Principles

Petitioners respectfully incorporate by reference the discussion under this same heading in the petition in *Hannigan, et al. v. Stansbury*, No. 98-___, and *Simmons, et al. v. Bankes*, No. 98-___.

B. The Court Of Appeals' Decision Addresses Important, Unresolved *Ex Post Facto* Questions On Which Prison Authorities And The Lower Federal And State Courts Require Guidance

Petitioners respectfully incorporate by reference the discussion under this same heading in the petition in *Hannigan, et al. v. Stansbury*, No. 98-___, and *Simmons, et al. v. Bankes*, No. 98-___.

II. The Kansas Court Of Appeals' Decision Is Contrary To This Court's *Ex Post Facto* Decisions

Petitioners respectfully incorporate by reference the discussion under this same heading in the petition in *Hannigan, et al. v. Stansbury*, No. 98-___, and *Simmons, et al. v. Bankes*, No. 98-___. In addition, this petition will

discuss the Kansas Court of Appeals' misreading of this Court's *ex post facto* cases.

1. First, and most importantly, the Kansas Court of Appeals erred in concluding that prison regulations are subject to *ex post facto* restrictions, at least in this case. Although the Kansas Department of Corrections promulgated the regulations pursuant to statutory authority, the controlling Kansas statute is clear that good time credits shall be "earned." The Department of Corrections lacked the power to provide otherwise, which simply proves the point that the *Ex Post Facto* Clause should be limited, as this Court's cases repeatedly have recognized, to the application of *penal statutes*. The conditional release statute in Kansas has not changed since respondent committed his crime, nor has his sentence changed, and he makes no such complaints. Moreover, not even the total amount of good time credits available to respondent has changed. Rather, respondent is complaining about an amendment to an administrative regulation designed to implement a statutory directive. The original regulation adopted an approach contrary to the plain statutory language and to the unwarranted benefit of inmates such as respondent. But there has been no change in the Kansas penal statutes that "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *California Dept. of Corrections v. Morales*, 514 U.S. 499, 506 n. 3 (1995).

2. Second, the Kansas Court of Appeals' opinion relies almost exclusively on this Court's decision in *Weaver v. Graham*, 450 U.S. 24 (1981), without even citing later decisions such as *Collins v. Youngblood*, 497 U.S. 37 (1990), and *California Dept. of Corrections v. Morales*, 514

U.S. 499 (1995). Thus, even assuming that prison regulations implicate the *Ex Post Facto* Clause, the Kansas Court of Appeals' decision hinges upon the sole proposition that "[i]t is the *effect* of the law that determines whether it is *ex post facto*." App. 15a (citing *Weaver*) (emphasis added). As explained more fully in the related petition in *Hannigan, et al. v. Stansbury*, No. 98-___, and *Simmons, et al. v. Bankes*, No. 98-___, that proposition is not consistent with most of the Court's recent *ex post facto* and "punishment" cases. *See, e.g., Hudson v. United States*, 522 U.S. ___, 118 S. Ct. 488, 493-95 (1997) (first question is whether enactment is non-punitive on its face or has non-punitive purpose); *Kansas v. Hendricks*, 521 U.S. ___, 117 S. Ct. 2072 (1997) (same); *cf. Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891, 897 (1997) (discussing to what extent legislative purpose may be relevant to the *ex post facto* analysis). Nor does the Court of Appeals' approach provide any limit to the reach of the *Ex Post Facto* Clause in the prison context, since many changes in prison regulations arguably have a disadvantageous "effect" on inmates.

In this case, the purpose behind the regulatory change is not punitive. The conditional release date regulation was amended to conform to the controlling statutory directive that good time credits be earned. The purpose of the amendment was not to impose additional criminal punishment on inmates.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant this petition for a writ of *certiorari* in order to resolve the splits of authority in the lower federal and state courts, and set this case for plenary review.

Respectfully submitted,

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August, 1998

APPENDIX A

Kansas Court of Appeals Decision 1a

APPENDIX B

The Kansas Supreme Court Order Denying Review 20a

APPENDIX C

Kansas Supreme Court Order Denying Recall of Mandate 21a

APPENDIX A

NOT DESIGNATED FOR PUBLICATION

No. 77,897

IN THE COURT OF APPEALS OF
THE STATE OF KANSAS

MARK L. STELTZLEN,
Appellant/Cross-Appellee,

v.

DAVID R. MCKUNE, Warden, and
CHARLES SIMMONS, Secretary of Corrections,
Appellees/Cross-Appellants.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; MARTIN ASHER, judge. Opinion filed September 5, 1997. Affirmed.

Charles J. Cavenee, of Legal Service for Prisoners, Inc., of Lansing, for appellant/cross-appellee.

Ed Britton, Jr., and *Jeff Cowger,* special assistants attorney general, and *Carla J. Stovall,* attorney general, for appellees/cross-appellants.

Before GREEN, P.J., PIERRON, J., and PHILIP C. VIEUX, District Judge, assigned.

Per Curiam: Mark L. Steltzlen appeals from a part of the trial court's judgment denying relief under his habeas corpus action. Steltzlen challenged the interpretation of certain amended regulations about how good time credits would be assigned to his conditional release date by the Department of Corrections (DOC). Although the trial

court found nothing wrong with DOC's interpretation of the amended regulations, the trial court determined that the amended regulations would violate the prohibition against ex post facto laws if the regulations were applied in determining Steltzlen's conditional release date. Steltzlen appealed and DOC cross-appealed.

Under K.S.A. 1996 Supp. 22-3725, Steltzlen was allowed to earn good time credits for up to half of his 1990 sentence of 15 to 20 years for aggravated robbery. Steltzlen's good time credits were subtracted from his minimum sentence to set a parole eligibility date and subtracted from his maximum sentence to establish a conditional release date. As a result, it was determined that Steltzlen's earliest possible parole eligibility date was November 17, 1997, and May 17, 2000, was his earliest conditional release date.

Before his parole eligibility date, Steltzlen forfeited 90 days of good time because of a disciplinary violation. In addition to the forfeiture, Steltzlen's unit team, which is charged with the duty of determining how many good time credits to award for each review period, concluded that Steltzlen should be awarded only 60 out of 120 possible good time credits. This resulted in a net loss of 30 days of good time credit. The forfeitures and withholdings were applied to both Steltzlen's parole eligibility date and to his conditional release date. Consequently, this action lengthened Steltzlen's confinement period before he would become eligible for parole and before he would reach his conditional release date.

In objecting to the adjustment of his conditional release date, Steltzlen claimed that K.A.R. 44-6-120 prohibited any adjustment of his conditional release date by forfeitures or withholdings until he reached his parole eligibility date. Although the warden agreed that good time credits could not be forfeited from Steltzlen's conditional release date before his parole eligibility date, the warden disagreed with Steltzlen on the issue of whether withheld good time credits could vary his conditional release. When the Secretary of Corrections (Secretary) affirmed the decision of the warden, Steltzlen petitioned for a writ of habeas corpus.

In his petition, Steltzlen argued that the forfeiture and the withholding of good time credits by the warden and the Secretary (1) were prohibited by other regulations of DOC and (2) violated the prohibition against ex post facto laws.

The first issue is whether the current regulations applicable to the award of good time credits and the setting of a conditional release date permit an inmate's conditional release date to be adjusted before the inmate reaches parole eligibility. The parole eligibility date represents the date on which an inmate becomes eligible to be considered for parole. Whether he or she is released at that time or at some later time prior to reaching the inmate's conditional release date is within the discretion of the Kansas Parole Board pursuant to statute and regulations. K.S.A. 22-3717; *Beck v. Kansas Adult Authority*, 241 Kan. 13, 29, 735 P.2d 222 (1987). In contrast, upon reaching his or her conditional release date, an inmate is entitled to be released. K.S.A. 22-3718; *Beck*, 241 Kan. at 29.

Steltzlen asserts that neither withholdings; nor forfeitures of good time credits are permitted to affect an inmate's conditional release date prior to the inmate reaching parole eligibility and, further, that only forfeitures may occur after parole eligibility. While DOC agrees that forfeitures of good time credits may not affect an inmate's conditional release date until after the inmate has reached his or her parole eligibility date, it asserts that good time withholdings are appropriately applied to the inmate's conditional release date both before and after reaching parole eligibility.

Resolution of this issue requires the interpretation of several regulations. Reviewing courts grant considerable deference to an agency's interpretation of its own regulations, and, unless clearly erroneous or inconsistent with the terms of the regulations, the agency's interpretation will not be disturbed. *Murphy v. Nelson*, 260 Kan. 589, Syl. ¶ 1, 921 P.2d 1225 (1996). In order to understand the parties' respective positions on both the interpretation issue and on the ex post facto issue, it is necessary to review the changes which have taken place in the applicable regulations since the time of Steltzlen's initial incarceration.

Regulations in Effect When Steltzlen Committed His Crime

Under the regulations in effect in 1990, when Steltzlen committed his crime and was incarcerated, parole eligibility was determined differently from conditional release. K.A.R. 44-6-108 (1989) stated in pertinent part:

> "(b) To establish eligibility for parole in certain cases amenable to reduction by good time credits, good time credits, as earned, shall

be awarded to reduce the time required to be served on the minimum term of those sentences as described in these regulations and applicable law.

"(c) To establish the conditional release date, good time credits, not forfeited, shall be presumed earned and shall be applied to the maximum sentence term when first computed."

K.A.R. 44-6-113 (1989) provided:

"In determining parole eligibility for cases . . . on and after January 1, 1979, including those after July 1, 1982, good time credits shall not be awarded in advance of earning or on a projected basis. Good time credits shall be awarded only after the inmate has been deemed, by the unit team, to have earned them. However, an auxiliary accounting record, separate from the official inmate record and for informational purposes only, may be used to show the maximum total authorized credits that the inmate may earn. This record may show the parole eligibility date which would occur if all good time were earned."

In contrast to 44-6-113 quoted above, K.A.R. 44-6-142(a) (1989) provided in pertinent part: "It shall be presumed, when computing the conditional release, that 100% of the available good time credit is earned and the good time credit shall be applied on a projected basis."

K.A.R. 44-6-120 (1989) included the following provision:

"(c) Application only to minimum until parole eligibility. All good time credit awards

> and forfeitures shall be applied only to the minimum sentence until the parole eligibility has been reached. However, meritorious good time shall be applied simultaneously to both the minimum and maximum sentence. After parole eligibility has been reached, no further good time credit of any kind shall be awarded on the minimum. After parole eligibility, all forfeitures of statutory good time credits or legislative good time credits, and all awards or forfeitures of 'meritorious' good time credits, shall be applied to the maximum term of the sentence to form the conditional release date. The inmate shall be considered as proceeding toward the conditional release date following parole eligibility or hearing."

Meritorious good time credits were awarded under special circumstances for heroic actions or for outstanding services and were in addition to the " 'statutory authorized' good time credits." K.A.R. 44-6-126 (1989); see K.S.A. 1996 Supp. 22-3717(s).

K.A.R. 44-6-124(a) (1989) set forth standards for awarding good time "[f]or parole eligibility" but mentioned no standards to be applied in awarding good time for conditional release. K.A.R. 44-6-124(a) (1989) further provided that an inmate was presumed to have earned good time credits for the time served in jail between his or her official "sentence begins date" and the date of admission to the prison facility. See K.S.A. 21-4614.

K.A.R. 44-6-125 (1989) described the good time credits applicable to parole eligibility in terms of being "earned" but described the good time credits applicable to conditional release as simply those credits "used to

create the conditional release date." The relevant subsection stated:

> "(b) Forfeit only on minimum until parole eligibility. Prior to parole eligibility, forfeited good time credits shall be subtracted from the amount of good time credits earned toward the parole eligibility only, and not from those credits used to create the conditional release date. After parole eligibility is established, forfeited credits shall be subtracted from the credits used to form the conditional release date."

When all of the above regulations are read together, it becomes clear that credits for *parole eligibility* had to be *actually* earned. The only good time credits an inmate was *presumed* to have earned for his or her parole eligibility date were for the period between the sentence begins date and the date of admission to the prison facility. These were automatically awarded and subtracted from the minimum sentence to make up the first tentative parole eligibility date. Thereafter, good time credits were awarded by the unit team after each review period only to the extent deemed earned and were applied to the inmate's minimum sentence to establish a progressively nearer parole eligibility date. K.A.R. 44-6-108(b) (1989); K.A.R. 44-6-113 (1989).

In contrast, an inmate's *conditional release date* was initially set based on a *presumption* that all credits authorized by the legislature *had been earned*. Standards for awarding good time to conditional release were not supplied because they were not needed – all available good time credits were awarded at the outset for purposes of

conditional release and could only be lost if forfeited. Awards and forfeitures were to affect the parole eligibility date only before reaching that date, and only forfeitures were to affect the conditional release after the parole eligibility date had been reached.

Amended Regulations

On January 3, 1995, DOC significantly changed the language of K.A.R. 44-6-142 applicable to setting conditional release dates. Instead of providing that 100 percent of the available good time credits applicable to the conditional release date should be presumed earned and applied on a projected basis, the regulation read in pertinent part:

> "When computing the conditional release date, it shall be presumed that prior to March 1, 1995, 100% of the available good time credits were earned. On and after March 1, 1995, good time credits shall be awarded on an earned basis pursuant to K.A.R. 44-6-124 for the purpose of determining the conditional release date." K.A.R. 44-6-142 (1996 Supp.).

In accord with this newly amended version of K.A.R. 44-6-142, Steltzlen's tentative conditional release date was changed, as was the method of awarding him good time credits toward his conditional release date. Instead of having the benefit of having already "earned" all of his conditional release good time credits, Steltzlen now had to *actually* earn them, except for those available for all the review periods preceding March 1, 1995.

While DOC hints in its brief that there is no evidence in the record of how DOC formerly interpreted its regulations, the former interpretation and the change in method brought on by K.A.R. 44-6-142 (1996 Supp.) are illustrated by the paperwork documenting Steltzlen's good time awards record. Before March 1, 1995, the unit team worksheets clearly show that Steltzlen's conditional release date remained constant at May 17, 2000, while on the same paperwork, awards and forfeitures of good time were used to adjust his parole eligibility date from a starting point of May 17, 2005 (the latest date possible for Steltzlen's parole eligibility). The worksheets on which these good time awards and forfeitures were recorded specifically direct the unit team not to use awards and forfeitures to adjust the conditional release date before the first hearing for parole consideration.

As of March 1, 1995, Steltzlen's sentence was converted over to the new system of applying credits to conditional release. This conversion is documented on a paper entitled "DEPARTMENT OF CORRECTIONS CONDITIONAL RELEASE GOOD TIME AWARDS AND FORFEITURES CONVERSION LOG." In this conversion, Steltzlen was credited with all the credits that could have been earned between his sentence begins date (May 17, 1990) and the effective date of the changes (March 1, 1995) without regard for his disciplinary record: 4 years, 9 months, and 14 days. Thus, for every day Steltzlen had already served, he was considered as having earned a good time credit toward his conditional release date. These credits were then applied to Steltzlen's maximum sentence "expiration date" (*i.e.*, the date he would be released if no good time credits were applied). When the

conversion was completed, Steltzlen's tentative conditional release date was August 3, 2005, instead of May 17, 2000. At later review periods, using forms that had been newly revised by DOC to accommodate the change in calculations, Steltzlen's conditional release date was adjusted downward with each new award of earned credits.

Before his disciplinary convictions, Steltzlen's conditional release date had reached December 17, 2004. When the 90 days of credits were forfeited and the 60 days of credits were withheld, Steltzlen's conditional release date was changed to January 17, 2005. When the warden ordered the forfeitures replaced, the forfeitures were voided from Steltzlen's log, and the conditional release date was changed to October 17, 2004.

Conflict in Regulations

Steltzlen argues that K.A.R. 44-6-108 (1994) and K.A.R. 44-6-120(d)(1) (1994), which are currently in effect, prohibit the action purportedly authorized by K.A.R. 44-6-142 (1996 Supp.), that is, the adjustment of an inmate's conditional release date before the inmate reaches parole eligibility and the withholding of good time credits from conditional release under any circumstances. Although the above regulations are slightly different from those quoted earlier, their substance remains the same. K.A.R. 44-6-108 (1994) reads in pertinent part:

> "(b) In cases where the time required to be served is amenable to reduction by good time credits, good time credits shall be awarded as earned to reduce the minimum term of those

sentences, as described in these regulations and applicable law.

"(c) To establish the conditional release date, good time credits shall be presumed earned and shall be applied to the maximum sentence term first computed."

The relevant portion of K.A.R. 44-6-120 (1994) reads:

"(d) Application only to minimum until parole eligibility.

(1) Good time credit awards and forfeitures shall be applied only to the minimum sentence until the parole eligibility has been reached.

(2) However, meritorious good time shall be applied simultaneously to both the minimum and maximum sentence.

(3) After parole eligibility has been reached, no further good time credit of any kind shall be awarded on the minimum.

(4) After parole eligibility, all subsequent forfeitures of good time credits shall be utilized to adjust the conditional release date."

K.A.R. 44-6-108 (1994) provides for the earning of good time credits for parole eligibility and for the presumption of credits being earned for conditional release. K.A.R. 44-6-120 (1994) also provides that awards and forfeitures are only to be applied to the parole eligibility date prior to reaching that date, and that forfeitures shall be applied to the conditional release date after passing parole eligibility. These regulations, in particular K.A.R. 44-6-120 (1994) with its express prohibition against

adjustment of the conditional release date prior to reaching parole eligibility, directly conflict with K.A.R. 44-6-124 (1996 Supp.) and K.A.R. 44-6-142 (1996 Supp.) as applied by DOC.

In attacking Steltzlen's arguments, DOC contends that Steltzlen has raised on appeal, for the first time, the issue of the regulations being in conflict and that this court may not, therefore, consider this issue. We disagree. Steltzlen has asserted from the very beginning that the actions DOC attempted to take under K.A.R. 44-6142 (1996 Supp.) are prohibited by the terms of K.A.R. 44-6-120 (1994) and other regulations. Therefore, the issue has been properly raised by Steltzlen.

Second, DOC argues that the regulations should be interpreted in light of the overall statutory and regulatory scheme. DOC notes that the definitions section of the applicable regulations, K.A.R. 44-6-101(m) (1994), defines conditional release date as "the maximum sentence ending date minus total authorized good time credits not forfeited." DOC argues that "authorized" simply refers to the credits earned. However, in light of the background and language of the current regulations, the word "authorized" refers to the total amount of good time credits authorized by the legislature. See K.A.R. 44-6-101 (1989) (describing good time credits as being prescribed and established by the Kansas Adult Authority as "authorized by K.S.A. 22-3717") and K.A.R. 44-6-113 (1989) (differentiating between earned good time credits and the "maximum total authorized credits that an inmate may earn"). In Steltzlen's case, the total authorized credits would be credits in the amount of half his sentence.

DOC notes the definition of conditional release in K.S.A. 22-3718 as being "the inmate's maximum term or terms, less such work and good behavior credits as have been earned" and the description in K.A.R. 44-6-124 (1996 Supp.) of credits being "earned" to adjust the conditional release date. DOC argues that it is clear that the overall statutory and regulatory scheme contemplates that inmates be given the opportunity to actually earn good time credits which will be applied to the conditional release date in an ongoing process starting from the date the inmate enters the custody of the Secretary. While this may be true of the applicable statutes and of the newly amended regulations, the fact remains that under the old system, DOC chose to interpret its statutory directive by presuming the earning of good time credits with regard to the conditional release date.

Because the regulations conflict, there is no way for DOC to abide by both sets of regulations. The rules of statutory construction are also generally applicable to the interpretation of regulations. See 2 Am. Jur. 2d, Administrative Law § 239, p. 258. The general rule is that the several provisions of an act (or, in this case, a set of regulations) should be read together and construed with the aim of bringing them into harmony and giving full effect to every provision if reasonably possible to do so. *Easom v. Farmers Insurance Co.*, 221 Kan. 415, Syl. ¶ 3, 560 P.2d 117 (1977). However, when this is not possible and related statutes conflict, it is often said that the most recent enactment prevails as being the latest expression of the legislative intent. 73 Am. Jur. 2d, Statutes § 255, p. 426. This general rule has been noted in several Kansas cases. See, *e.g.*, *Jones v. Continental Can Co.*, 260 Kan. 547,

556, 920 P.2d 939 (1996); *State v. Sodders*, 255 Kan. 79, Syl. ¶ 2, 872 P.2d 736 (1994); *State v. Keeley*, 236 Kan. 555, 560, 694 P.2d 422 (1985).

In light of the above rule and DOC's clear intent to use the amended regulations to create a system where good time credits will be actually earned for both the parole eligibility date and the conditional release date, the implications and directives of K.A.R. 44-6-108(c) (1994) and 44-6-120(d) (1994) must give way to the framework established in the amended versions of K.A.R. 44-6-124 and 44-6-142. DOC's interpretation of its regulations should therefore stand as applied to those who committed their crimes on or after March 1, 1995.

The next issue is whether the application of the new regulatory scheme for awarding good time credits and setting conditional release dates violates the prohibition against ex post facto laws when applied to Steltzlen. United States Const. article I § 9, cl. 3 and § 10, cl. 1 provide that no state shall pass any ex post facto law. These clauses prohibit the enactment of any law " 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.' [Citations omitted.]" *Weaver v. Graham*, 450 U.S. 24, 28, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981). "[T]wo critical elements must be present for a criminal or penal law to be *ex post facto:* it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. [Citations omitted.]" *Weaver*, 450 U.S. at 29.

The first question is whether the ex post facto prohibition applies to regulations. Although unable to find any Kansas case explicitly ruling on this issue, "[p]olitical subdivisions of a state, or quasi-legislative instrumentalities, exercising delegated legislative power are within the ambit of the ex post facto clause." 16A C.J.S., Constitutional Law § 409, p. 355. This view that the ex post facto clause applies to regulations would seem to be an appropriate approach in Kansas, where it is well recognized that "[t]he Kansas Administrative Regulations when adopted have the force and effect of a statute (K.S.A. 77-425) and as in the case of statutes will be construed to operate prospectively unless a contrary intent is clearly indicated." *Harder v. Kansas Comm'n on Civil Rights,* 225 Kan. 556, 559, 592 P.2d 456 (1979); see *Jones v. The Grain Club,* 227 Kan. 148, Syl. ¶ 1, 605 P.2d 142 (1980).

DOC argues that the new regulations are not retrospective because they presume that all good time credits available prior to March 1, 1995, were earned, and that it is only after March 1, 1995, that new credits must actually be earned. Therefore, under DOC's view, any withholdings would occur as a result of future conduct. DOC also argues that the change does not impose additional punishment to that prescribed because Steltzlen still has the opportunity to earn the same number of good time credits as before.

It is the effect of the law that determines whether it is ex post facto. *Weaver,* 450 U.S. at 31. In rendering its decision on the ex post facto issue, the district court relied greatly on *Weaver.* In *Weaver,* the Court addressed the question of whether a change in Florida's provisions

for prison gain time credits was an ex post facto law. Under Florida law, a certain number of gain time credits were awarded to inmates automatically on a monthly basis simply for avoiding disciplinary infractions and for performing assigned tasks. In 1978, Florida law lessened the number of gain time credits available. At the same time, however, the law was also changed to increase the number of "special gain-time" credits which could be earned for performing conscientious or outstanding work in a variety of ways. *Weaver,* 450 U.S. at 34-35, n.18. Weaver argued that the new law was an ex post facto law when applied to him.

The Court in *Weaver* made it clear that an ex post facto law does not depend on whether the right interfered with is a vested right. *Weaver,* 450 U.S. at 29. Such an analysis is relevant under due process considerations but not under the ex post facto clause. The Court further noted that a statute may be retrospective even if it alters conditions outside the sentence. 450 U.S. at 32.

Addressing the retrospectivity requirement, the Court stated:

> "The critical question is whether the law changes the legal consequences of acts completed before its effective date. In the context of this case, this question can be recast as asking whether [the Florida statute in question] applies to prisoners convicted for acts committed before the provision's effective date. Clearly, the answer is in the affirmative." *Weaver,* 450 U.S. at 31.

The Court went on to address the question of whether the law disadvantaged Weaver. Florida argued

that because of the added opportunities for special gain time credits, the net effect of the changed law was an increased availability of gain time deductions and that the change, therefore, did not disadvantage those like Weaver who committed their crimes prior to the effective date of the change. The Court acknowledged the expanded opportunities for special gain time deductions, as well as the legislative intent under the changes to promote rehabilitation and to increase incentives for productive conduct. *Weaver,* 450 U.S. at 34-35. However, the Court went on to say:

> "But none of these provisions for extra gain time compensates for the reduction of gain time available solely for good conduct. The fact remains that an inmate who performs satisfactory work and avoids disciplinary violations could obtain more gain time per month under the repealed provision . . . *than he could for the same conduct under the new provision.* . . . To make up the difference, the inmate has to satisfy the extra conditions specified by the discretionary gain-time provisions." (Emphasis added.) 450 U.S. at 35.
>
> "Thus, the new provision constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment. This result runs afoul of the prohibition against *ex post facto* laws." *Weaver,* 450 U.S. at 35-36.

At the time Steltzlen committed his crime, the regulations in effect granted Steltzlen an automatic award of all statutorily available good time available for his conditional release date and set his conditional release date on that basis. All Steltzlen had to do under those regulations

was keep from forfeiting the good time he was presumed to have earned. When the new regulations were applied to Steltzlen, the conditional release good time credits that had been presumptively awarded to Steltzlen were taken away and only a portion were restored. In order to regain the rest, Steltzlen is required to meet extra conditions not required under the old regulations. The new regulations adversely change the legal consequences of Steltzlen's crime by creating a situation where Steltzlen must now earn good time credits that he was considered to have already earned under the old regulations. This is similar to the situation in *Weaver* where the statutory changes enacted there required the inmates to do something extra and to subject themselves to the discretion of the prison in order to gain the same level of early release advantage accorded under the old statute.

The regulations do more than affect the consequences of Steltzlen's future conduct. The regulations reach back and take away what was already given to Steltzlen under the old regulations in effect at the time of his crime and, accordingly, have a disadvantageous retrospective effect on him. Cf. *Lynce v. Mathis*, 519 U.S. ___, 137 L. Ed. 2d, 63, 75, 117 S. Ct. 891 (1997) (holding that a new statute interpreted as calling for the retroactive cancellation of formally awarded provisional credits to certain classes of inmates was an ex post facto law).

A similar situation was also encountered in *Spradling v. Maynard*, 527 F. Supp. 398 (W.D. Okla. 1981). In *Spradling*, the Oklahoma statutes in effect prior to September 8, 1976, provided a system where work and good time credits were automatically applied to an inmate's sentence and were mandatory, subject only to being forfeited

at a later date for disciplinary reasons. The statutes were then amended to require the inmate to earn the credits by satisfying certain conditions. The court in *Spradling* determined that the new law made more onerous the punishment for crimes committed before its enactment and violated the ex post facto prohibition when applied to inmates who committed their crimes prior to the effective date of the act. 527 F. Supp. at 404. Applying the approach of *Spradling*, the current regulations would be an ex post facto law as applied to Steltzlen.

DOC also argues that the regulations in question merely effectuate the enabling statute's directive that good time credits shall be awarded on an earned basis. See K.S.A. 1996 Supp. 22-3725(d). However, in the recent case of *Lynce*, 137 L. Ed. 2d 63, the Supreme Court chastised the parties for placing undue emphasis on the lawmakers' subjective *intent* and focused on the importance of the *effect* brought by the disputed changes. While the current regulations arguably do a better job of fulfilling the legislative intent, this does not change the fact that DOC's chosen method of complying with the legislative directive was different in 1990 than it is now, and that difference will put inmates like Steltzlen at a disadvantage if they are subject to the recent regulatory changes. Nor does it matter that the legislative proviso for good time credits, and the admittedly generous terms of the 1990 regulations regarding conditional release, were established as a matter of grace. An ex post facto violation can arise even from a change to penal provisions accorded as a matter of grace. *Weaver*, 450 U.S. at 30-31.

Affirmed.

APPENDIX B

SUPREME COURT ORDER
DISTRICT CASE NO. 9607HC74

IN THE SUPREME COURT
OF THE STATE OF KANSAS

MARK L. STELTZLEN, APPELLANT, CROSS-APPELLEE,
V NO. 96-77897-AS
DAVID R. MCKUNE, APPELLEES,
ET AL., CROSS-APPELLANTS.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY DAVID R. MCKUNE, ET AL.

CONSIDERED BY THE COURT AND DENIED.

DATE: 07/09/98.

CAROL G. GREEN
CLERK

APPENDIX C

COURT OF APPEALS ORDER
DISTRICT CASE NO. 9607HC74

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

MARK L. STELTZLEN, APPELLANT, CROSS-APPELLEE,
V NO. 96-77897-A
DAVID R. MCKUNE, APPELLEES,
ET AL., CROSS-APPELLANTS.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR STAY PENDING CERTIORARI TH [sic] THE UNITED STATES SUPREME COURT BY APPELLEE, DAVID MCKUNE, ET AL.

DENIED.

RESPONSE NOTED.

DATE: 08/05/98.

CAROL G. GREEN
CLERK

Filed 10/19/98

ORIGINAL

Supreme Court, U.S.
FILED
OCT 19 1998
CLERK

No. 98-366

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

DAVID R. MCKUNE, Warden,
CHARLES SIMMONS, Secretary of Corrections,

Petitioners,

vs.

MARK L. STELTZLEN,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Respondent asks leave to file a Brief in Opposition to Petitioner's petition for writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[x] Respondent has previously been granted leave to proceed *in forma pauperis* in the following court(s):

District Court of Leavenworth County, Kansas
Court of Appeals of the State of Kansas

[ ] Respondent has not previously been granted leave to proceed *in forma pauperis* in any other court.

Respondent's affidavit or declaration in support of this motion is attached hereto.

Mark Steltzlen
Mark Steltzlen

RECEIVED
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OFFICE OE THE CLERK
SUPREME COURT, U.S.

19 pp

AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Mark L Steltzlen, am the Respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes _____ No X

   If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes _____ No X

   If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account?

   Yes _____ No X

   If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes _____ No X

   If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I declare under penalty of perjury that the foregoing is true and correct.
Executed on September 22, 1998.

Mark L Steltzlen
Mark. L. Steltzlen

El Dorado Correctional Facility

Certified Trust Fund Account Statement

I certify that the amount given below is the lesser of a) the inmate's average account balance or b) the total deposits, for the last six months or lesser period. Attached to this document is a certified copy of the inmate's trust fund account statement for the past six months.

$ 117.10

Inmate's Name Mark Steltzlen 52151

Signature of Authorized Officer B Posey

El Dorado Correctional Facility - Inmate Accounts

Date 9/10/98

No. 98-366

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

DAVID R. McKUNE, Warden,
CHARLES SIMMONS, Secretary of Corrections,

Petitioners,

v.

MARK L. STELTZLEN,

Respondent.

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. The State Regulations

At the time of Respondent's criminal behavior in this case, the State of Kansas sentenced offenders by a system of indeterminate punishment. The two critical dates in determining the actual release of a prisoner were his parole eligibility date, the first date the individual might be permitted to be released on parole, (K.S.A. 22-3717), and the inmate's conditional release (CR) date, the date on which the inmate was required to be released by the Department of Corrections.[1] (K.S.A. 22-3718). Both the PE and CR dates were affected by the award of "good time."

Regulations governing the issuance of good time were issued by the Department of Corrections. The complex set of regulations applicable to Respondent are discussed at length in the Court of Appeals Decision. *See* Pet. App. at 4a-10a. These regulations, under Kansas law, have the force and effect of statute. *See* K.S.A. 77-425.

Under the regulations in effect when Respondent committed his crime, good time for parole eligibility was computed differently than from conditional release. The applicable administrative regulation (K.A.R. 44-6-108 (1989)) stated, in part:

> (B) To establish eligibility for parole in certain cases amenable to reduction by good time credits, good time credits, as earned, shall be awarded to reduce the time required to be served on the minimum term of those sentences as described in these regulations....
> (C) To establish the conditional release date, good time credits, not forfeited, shall be presumed earned and shall be applied to the maximum sentence term when first computed.

---

[1] In the period of time between the inmate's parole eligibility and conditional release dates, the inmate was subject to jurisdiction of the Kansas Parole Board. K.S.A. 22-3717.

Kansas Administrative Regulation 44-6-113 provided that:

> "In determining parole eligibility...good time credits shall not be awarded in advance of earning or on a projected basis. Good time credits shall be awarded only after the inmate has been deemed, by the unit term, to have earned them.

Kansas Administatrative Regulation 44-6-124(a) provided standards to be used by unit teams in deciding whether to award or withhold good time credits for purposes of parole eligibility. Those regulations provided for withholding for disciplinary offenses, and also provided discretion for the unit team to issue credits, based upon "good work, behavior, and on other performance factors related to effective rehabilitation of the inmate."

In contrast, the regulations governing conditional release provided that "It shall be presumed, when computing conditional release, that 100% of the available good time credit is earned and the good time credit shall be applied on a projected basis." Pet. App. 5a.

In addition to these sections governing awarding and withholding of good time, a separate provision governed forfeiture of good time already earned. That provision stated:

> Forfeit only on minimum until parole eligibility. Prior to parole eligibility, forfeited good time credits shall be subtracted from the amount of good time credits earned toward the parole eligibility only, and not from those credits used to create the conditional release date. After parole eligibility is established, forfeited credits shall be subtracted from the credits used to form the conditional release date.

K.A.R. 44-6-125(b)(1989).

When read together, the above sections required that good time credits toward parole eligibility were awarded by the unit team after each review period only to the extent deemed earned and were applied to the inmate's minimum sentence to establish a progressively nearer parole eligibility date. In contrast, an inmate's conditional release date was set based upon the presumption that all credits had been earned. "Standards for awarding good time to conditional

release were not supplied because they were not needed--all available good time credits were awarded at the outset for purposes of conditional release..." Pet. App. at 7a-8a. In addition, while good time could be forfeited for disciplinary infractions, forfeitures affected only the parole eligibility date before the date was reached. Only after parole eligibility was reached could good time be forfeited on an inmate's conditional release date. *Id.*

B. The Amended Regulations

On January 3, 1995, the Department of Corrections amended its regulations concerning the award of good time. The amended regulation provides:

> When computing the conditional release date, it shall be presumed that prior to March 1, 1995, 100% of the available good time credits were earned. On and after March 1, 1995, good time credit shall be awarded *on an earned basis* pursuant to K.A.R. 44-6-124 for the purpose of determining the conditional release date. K.A.R. 44-6-142 (1996 Supp.) (emphasis added).

C. Application of These Regulations

Respondent Mark Steltzlen was incarcerated in 1990, on a sentence of 15-20 years. Pursuant to the regulations then in force, Respondent was awarded 100% of the available good time credits applicable to his conditional release. The credits were presumed earned and applied on a projected basis, giving him a conditional release date of May 17, 2000. Prior to 1995, no awards and forfeitures of good time with respect to Respondent's parole eligibility date changed this conditional release date. Pet. App. 8a-9a.

After March 1, 1995, the Department of Corrections "converted over" to applying the new system of applying credits toward Respondent's conditional release. He was credited, at that

time, with all good time "accumulated" up to 1995. When the conversion was completed, his release date was extended from May 2000 to August 2005. At subsequent review proceedings, Respondent was awarded good time on several occasions. However, prior to Respondent's parole eligibility date of November 17, 1997, Respondent allegedly engaged in disciplinary misconduct which caused a forfeiture of 90 days of good time. In addition, the unit team, which was responsible for the discretionary award of good time, awarded 60 days of good time and forfeited 60 days of good time at its review period. Prior to 1995, neither the forfeiture nor the withholding of good time could have been applied to Respondent's conditional release date. Ultimately, the warden canceled the forfeiture of good time, leaving Respondent with a 60 day withholding imposed by the unit team that retaded his conditional release date. Pet. App. at 100.

D. The Litigation in This Case

Respondent filed a habeas corpus actions within the state courts, which challenged the application of the amended regulations to him as a violation of the Constitution's prohibition on Ex Post Facto laws. The district court agreed with his position, and ordered the withheld good time restored to him. On appeal, the Court of Appeals agreed with Respondent and affirmed the ruling of the district court in an unpublished opinion. *Steltzlen v. McKune*, (No. 77,897)(Kan. Ct. App. Sept. 5, 1997).

After describing in detail the regulations affecting good time, the Court turned to whether the retroactive changes in the regulations constituted a violation of the Ex Post Facto Clause. Quoting *Weaver v. Graham*, 450 U.S. 24, 28 (1981), the Court noted that the critical elements that must be present for a criminal or penal law to be ex post facto are that it "apply to events

occurring before its enactment, and it must disadvantage the offender affected by it." Pet. App. at 14a.

The Court first found that the administrative regulation issued by the Department of Corrections constituted laws for purposes of the Ex Post Facto Clause. The Court relied upon the fact that, in Kansas, administrative regulations have the force and effect of statute (K.S.A. 77-425), and "as in the case of statutes will be construed to operate prosecutively unless a contrary intent is clearly indicated." Pet. App. 15a.[2]

Relying upon *Weaver*, the court next determined that the provision was retrospective in operation. The Court noted that at the time Steltzlen committed his crimes, the regulations in question granted him automatic award of good time for his conditional release which could only be taken for misconduct, and then, for misconduct occurring after his parole eligibility date. The amended regulations, in contrast, required Respondent to meet additional obligations determinable at the discretion of prison officials. The Court found the change analogous to the retrospective changes involved in *Weaver,* where a Florida law had lessened the number of automatic good time credits that had previously been available under Florida law.

The Petitioner sought review from the Kansas Supreme Court, and the Court, without opinion denied review.

---

[2]Although we agree with Petitioner that the determination of *when* an administrative regulation constitutes a "law" for Ex Post Facto purposes may not always be crystal clear, we disagree with Petitioner's implicit contention that there is a conflict among courts concerning *whether* administrative rules can constitute laws for Ex Post Facto purposes.

REASONS FOR DENYING THE WRIT

The unpublished and unanimous opinion in this case, an opinion that was not questioned by a single judge of the Kansas Supreme Court in the Petition for Review, is an inappropriate vehicle for a full-scale re-examination of Ex Post Facto Doctrine. This would be the case even if this Court had not taken the time, as it did only last year in *Lynce v. Mathis*, 117 S.Ct. 891, 895 (1997), to address some of the very questions that Petitioner seeks to have examined. Because this case does not break any new ground, because it faithfully applies Supreme Court and lower-court opinion, and because it turns on State law issues which this Court should not disturb, we respectfully submit that the Court should deny certiorari.

1. The lynchpin of Petitioner's argument is its assertion that there is a conflict in the lower courts over whether "regulations affecting inmates" are "laws" for purposes of Ex Post Facto analysis, and in particular, whether Ex Post Facto provisions can apply to prison or parole regulations. (*See* Petition for Certiorari at 11, referring to Petitioner's arguments in *Hannigan v. Stansbury*, No. 98-367, and *Simmons,et al. v. Bankes*, No. 98-367). With the greatest respect, we do not believe that these assertions fairly portray the views of the federal court. Rather, we believe that while the question of *when* an administrative regulation violates Ex Post Facto may sometimes be difficult, there is no serious dispute *whether* administrative regulations promulgated in the exercise of delegated legislative power can be laws for purposes of Ex Post Facto analysis.

As a matter of logic, a decision that administrative regulations could not be "laws" for Ex

Post Facto purposes would be strange, indeed. The Ex Post Facto clause stands to place limits on the "sovereign's ability to use its law-making power to modify bargains it has made with its subjects." *Lynce v. Mathis,* 117 S.Ct. 891, 895 (1997). A system that exempted administrative regulations from scrutiny under the Ex Post Facto clause would permit legislatures to avoid application of the Ex Post Facto clause and to alter bargains, by the simple expedient of delegating legislative power to an administrative agency, and then leaving it to that agency to write retrospective rules.

Each and every circuit has, in fact, taken the position that an administrative agency exercising delegated legislative power can issue regulations constituting "law" affecting prisoners for Ex Post Facto purposes. That is the basis for holding that revised and more onerous guidelines, issued by the United States Sentencing Commission, cannot be applied to inmates whose criminal conduct occurred before issuance of the guidelines.[3] Not only has this position been adopted by all of the circuits, it is the assumption of the Commission itself, which has written a policy statement concerning how sentencing courts should apply the sentencing guidelines, when application of the guideline extant at the time of sentencing might violate the Ex Post Facto clause. *See* U.S.S.G. §1B1.11. And, obviously, such regulations can have an Ex Post Facto effect even though the Commission has no power to change the minimum or

---

[3]*See United States v. Harotunian*, 920 F.2d 1040, 1042 (1st Cir. 1990); *United States v. Young*, 932 F.2d 1035, 1038n.3 (2d Cir. 1991); *United States v. Kopp*, 951 F.2d 521, 526 (3d Cir. 1991); *United States v. Morrow*, 925 F.2d 779, 782-83 (4th Cir. 1991); *United States v. Suarez*, 911 F.2d 1016, 1022-23 (5th Cir. 1990); *United States v. Nagi*, 947 F.2d 211, 213n.1 (6th Cir. 1991), *cert. denied,* 504 U.S. 958 (1992); *United States v. Seacott*, 15 F.3d 1380 (7th Cir. 1994); *United States v. Bell*, 991 F.2d 1445 (8th Cir. 1993); *United States v. Sweeten*, 933 F.2d 765, 772 (9th Cir. 1991); *United States v. Mondaine*, 956 F.2d 939 (10th Cir. 1992); *United States v. Worthy*, 915 F.2d 1514, 1516n.7 (11th Cir. 1990); *United States v. Green*, 952 F.2d 414 (D.C. Cir. 1992), *cert. denied,* 503 U.S. 1010 (1992).

maximum sentence imposed by the legislature for the particular offense. In sum, contrary to the argument of Petitioner, there is universal agreement within the federal courts that administrative regulations affecting an inmate's actual term of imprisonment can constitute laws, within the meaning of the Ex Post Facto clause.

2. While the issue of *whether* an administrative regulation can constitute a law for Ex Post Facto purposes is, contrary to Petitioner's assertion, relatively clear, we have no dispute that the question of *when* such a regulation is a law is less settled. For a number of reasons, however, this case is an exceedingly poor vehicle to resolve such an issue.

At the outset, we doubt whether any magic and universal rule can be adopted to resolve the question. Administrative agencies are not all of a type; some, like the United States Sentencing Commission, clearly "make law"--others may only be empowered to issue rules to regulate discretion and policy in the "execution" of laws. *See generally, Prater v. United States Parole Commission*, 802 F.2d 948, 953 (7th Cir. 1986)(en banc).

In making the sensitive determination of whether a state agency's rules are "laws" for purposes of the Ex Post Facto clause, prudential considerations argue for deference to the State's own characterization of its administrative rules. In this case, for example, the Kansas Court of Appeals held that the regulations were "laws" for purposes of Ex Post Facto in reliance on the fact that, under K.S.A. 77-425, such regulations have, in our state, the force of statute. The Court of Appeals also relied appropriately upon cases that held that "as in the case of statutes" such regulations should generally be construed to operate prospectively. *See* Pet. App. at 15a.

While Petitioner argues that the Court of Appeals decision would not provide "any limit

to the reach of the Ex Post Facto Clause in the prison context" (Pet. Br. at 13), examination of Kansas Regulatory Law reveals that Petitioner is almost certainly incorrect. Kansas Statutes Annotated 77-415, the statute defining the regulatory authority of state agencies in Kansas, exempts from its formal rulemaking process rules relating to the "internal management of the agency" and rules relating to "emergency or security procedures of a correctional institution." Thus, security rules that might have an incidental, but detrimental effect on inmates, are not compassed by the Court of Appeals decision. Even less affected by the decision are the manuals, running hundreds of pages, issued by the Department of Corrections dealing with prison policy. *See* IMPP Program Manual (1998). Our Legislature, Administrative Agencies, and courts have been able to separate those administrative pronouncements that constitute "laws" from those that regulate discretionary policy. The attention of the Supreme Court of the United States to this issue, we most respectfully submit, is not required. Similarly, Petitioner's argument that the Ex Post Facto clause should not be applied because the Department of Corrections's original 1979 regulations concerning good time was "contrary to the plain statutory language" and provided an "unwarranted benefit" to inmates is a question of State law which was not resolved in Petitioner's favor during the proceedings in the Kansas Court of Appeals . *See* Pet. App. at 19a (describing amended regulations as "arguably" better at fulfilling the legislative directive).

3. The decision of the Court of Appeals is an appropriate interpretation of this Court's prior Ex Post Facto precedents. In *Weaver v. Graham*, 450 U.S. 24 (1981), this Court resolved an Ex Post Facto challenge involving a question almost identical to the one in this case--whether Florida's retroactive reduction in gain time credits violated the Ex Post Facto Clause. The

Florida system reduced the number of monthly gain time credits awarded to an inmate who "abides by prison rules and adequately performs his tasks." 450 U.S. at 33. At the same time, however, the law was changed to increase the number of "special" gain time credits which could be earned for performing conscientious or outstanding work. This Court rejected Florida's argument that the possibility of extra gain time for outstanding work negated the Ex Post Facto violation caused by the reduction in gain time. The Court stated:

> But none of these provisions for extra gain time compensates for the reduction of gain time available solely for good conduct. The fact remains that an inmate who performs satisfactory work and avoids disciplinary violations could obtain more gain time per month under the repealed provision than he could for the same conduct under the new provision....*Even then, the award of the extra gain time is purely discretionary, contingent on both the wishes of the correctional authorities and special behavior by the inmate*... 450 U.S. at 35 (citations omitted)(emphasis added).

It is not surprising that the Court of Appeals held the change in the award of good time in Kansas analogous to the change in Florida. Indeed, the similarities are stark. Prior to the change in good time rules, Respondent was awarded all statutorily available good time. That good time was defeasible only for misconduct, and even then, only for misconduct occurring after his parole eligibility date. After the change, the award of good time for conditional release was contingent on the discretion of his unit team. Even if Respondent engages in no misconduct, he is not assured an award of good time under this new regulation. *See* Pet. App. at 18a-19a.

4. On page 12 and 13 of its Brief, Petitioner faults the Court of Appeals decision for relying almost exclusively upon *Weaver v. Graham, supra.* Indeed, the Court of Appeals decision cites and relies heavily upon *Weaver, supra,* and *Lynce v. Mathis,* 117 S. Ct. 891 (1997). Since those cases are the two Supreme Court precedents that deal directly with the question of

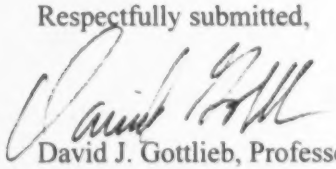
whether the reduction or revocation of credits against sentence violates the Ex Post Facto clause, and since neither of the two cases provoked even a single Justice to dissent, we fail to see why the Court of Appeals should be faulted for its choice.

5. Finally, we recognize that Petitioner has tied together their Petition in this case with Petitions in two other cases, *Hannigan, et al. v. Stansbury, supra,* and *Simmons, et al. v. Bankes, supra. Stansbury* deals with the question of whether the failure to credit good time for purposes of *parole eligibility*, as a result of a different amendment to the Administrative Regulations, passed in 1993, violates the Ex Post Facto clause. In *Stansbury* and *Bankes,* the inmates were subject to withholding of good time as a result of their refusal to participate in a Sex Offender Treatment Program. While the validity of the 1995 amendment that is the heart of this case is raised in the above petitions, we note that the Kansas Supreme Court's consideration of the conditional release issues in *Stansbury* and *Bankes* is not central to its analysis. We also note that even if this Court accepts certiorari and resolves the Ex Post Facto questions in these two cases, the validity of the State's Sex Offender Treatment Program will still be in question. In an unrelated, but significant case, the United States District Court of the District of Kansas has just held unconstitutional aspects of the current implelmentation of the Sex Offender Treatment Program, on the ground that it requires compulsory self-incrimination in violation of the Fifth Amendment. *Lile v. McKune,* 1998, U.S. Dis. Lexis 15102 (D. Kan. Sept. 16, 1998). Thus, even if the Court accept certiorari to deal with the Ex Post Facto issues, the validity of the Sex Offender Treatment Program will not be finally resolved.

CONCLUSION

For the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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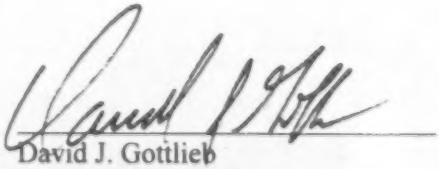

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Nos. 98-366 & 98-367

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

DAVID R. McKUNE,
Petitioner,

v.

MARK L. STELTZLEN,
Respondent.

On Writs of Certiorari To The
Supreme Court Of The State Of Kansas

BRIEF *AMICI CURIAE* OF OHIO, ALABAMA, ALASKA, ARIZONA, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VERMONT, WEST VIRGINIA, WYOMING AND THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA IN SUPPORT OF PETITIONERS

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The 36 *amici* states support the Petitioners in two related cases before this Court; *McKune v. Steltzlen*, Case No. 98-366 and *Hannigan, et al v. Stansbury, et al*, Case No.98-367.

The Petitioners in *McKune* are:

David McKune
Charles Simmons

The Respondent in *McKune* is:

Mark Steltzlen

The Petitioners in *Hannigan* are:

Robert Hannigan
David McKune
William Cummings
Anthony McElroy
Jamie Lanza
Mr. Wilson
Mr. Taylor
Mr. Robinson
Mr. Stokes
Mr. Ron Hicks
The Kansas Department of Corrections

The Respondents in *Hannigan* are:

Raymond Stansbury
Michael Banks

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STATEMENT OF *AMICI* INTEREST

The State of Ohio and 35 other *amici* States join together in supporting the petitions for a writ of certiorari filed by the State of Kansas. At issue among other things is whether the *ex post facto* prohibition against retroactive punishments bars prison administrators from requiring certain inmates to participate in a remedial program -- here, a sexual abuse treatment program -- as a condition for continuing to earn future good-time credits. In holding that the clause prohibits States from requiring inmates to participate in such programs, the *amici* States respectfully submit that the lower court committed a reversible -- and highly consequential error.

The issue matters to the amici States for several reasons. First, the lower court's expansive construction of the *ex post facto* clause undermines one of the essential goals of prison administration -- rehabilitation. Whether in the area of sexual-abuse crimes or in other areas of criminology, an overriding objective of corrections work is to equip convicts to make a healthy, productive, safe and in the end permanent return to society. An interpretation of the *ex post facto* clause that prevents prison officials from fully using such treatment programs for *all* of their inmates, however, threatens to sidetrack if not affirmatively deter the achievement of each of these goals.

Second, the interpretation of the *ex post facto* clause embraced by the Kansas Supreme Court markedly contracts the necessary administrative flexibility needed to run a State prison. Prison officials with custody over an inmate serving a 20-year sentence are bound to see a host of new medical and sociological theories regarding prison administration over the course of that inmate's sentence. No doubt these developments do not give prison wardens carte blanche to impose new punishments during the course of the sentence. But surely these developments allow administrators to institute progressive treatment programs that account for these changes in

penological thinking. Again, so long as the primary thrust of the new programs is remedial rather than punitive, the *amici* States respectfully submit that these rehabilitation requirements are no business of the *ex post facto* clause.

Third, many of the *amici* States have good-time credit regulations similar to those of Kansas. Above all else, States use good-time credits to measure eligibility for early release and early consideration for parole. But, as with other remedial tools, prison administrators need flexibility to adjust those regulations to keep pace with new theories regarding rehabilitation and with fresh concerns about the safety of releasing an individual.

Even from the perspective of prisoners (also citizens of the States), it is not clear that the analysis adopted by the Kansas Supreme Court will in fact advance the liberty interests of present and future inmates. Such rigid interpretations of the *ex post facto* clause permit regulatory discretion only in the direction of rules leading to an early release. Yet few prison wardens or corrections officials will be willing to experiment with progressive early-release programs under such a one-way ratchet. At the end of the day, the lower-court decision thus "discourages" the "desirable development" of enacting laws to govern these issues and of developing new ways to rehabilitate prisoners. *Sandin v. Connor*, 515 U.S. 472, 482 (1995). For these reasons and those developed below, we submit this brief *amici curiae* for the Court's consideration.

REASONS FOR GRANTING THE WRIT

All three traditional reasons for granting the writ support the Kansas petitions here. The lower-court decision deepens a conflict of authority regarding the application of the *ex post facto* clause to discretionary prison regulations. The decision implicates essential federal questions affecting the prison-

administration interests of the sovereign States. And it fails correctly to resolve these important issues.

I. The Court Should Grant The Writ To Resolve A Growing Split Of Authority Regarding Application Of The *Ex Post Facto* Clause To Ministerial Prison Regulations.

By statute Kansas provides that "[g]ood time credits shall be awarded on an earned basis pursuant to rules and regulations adopted by the secretary of corrections." K.S.A. 22-3725(d). In implementing the statute, the State has adopted several different sets of administrative regulations. The most recent one, and the one under attack here, requires inmates to "participate in assigned programs" -- in this instance, a rehabilitation program for those who have been convicted of sexual-abuse crimes -- in order to earn future good-time credits towards parole eligibility or early release. K.A.R. 44-6-124(g) (1993). No one disputes that a prior set of administrative regulations did not require participation in such remedial programs as a condition of earning good-time credits.

One question that arises under these circumstances is whether the *ex post facto* clause even applies to such inherently changeable ministerial rules. In providing that "[n]o State shall . . . pass any . . . *ex post facto* Law," Art. I, sec 10, the clause prohibits only laws that "retroactively [1] alter the definition of crimes or [2] increase the punishment for criminal acts." *California Dep't of Corrections v. Morales*, 514 U.S. 499, 505 (1995). In construing the clause, the Court has never applied the provision to procedural or remedial changes in the law. Nor, to the *amici*'s knowledge, has the Court ever applied the clause to administrative regulations, or for that matter even suggested that the clause applies in this executive (as opposed to legislative) setting.

The Court's two-century silence on the application of the clause to administrative regulations, in our considered judgment, is not surprising. A prohibition against "*ex post facto* laws" is a prohibition against legislative legerdemain. It does not limit executive-branch decisions about when to prosecute, when to investigate, when to plea bargain. And it does not limit judicial-branch decisions about what the law means. So long as the legislature does not retroactively change the definition of crime or change the rules of punishment, it does not enact an *ex post facto* law. For like reasons, so long as the ministerial authority the legislature delegates to administrative agencies comports with the bar against vague laws, with the limitations of due process and with the prohibitions against double jeopardy, its actions withstand constitutional scrutiny.

Moreover, when measured against the traditional *ex post facto* yardsticks -- notice, reasonable expectations, fairness -- a focus on the underlying enactments of the legislature in no way diminishes the clause's force. Consider again the pertinent language of the Kansas law: "Good time credits shall be awarded on an earned basis pursuant to rules and regulations adopted by the secretary of corrections." K.S.A. 22-3725(d). Nothing Kansas did wavered from its steadfast position that good-time credits would be earned. And no prisoner in light of this statute had any tenable basis for assuming that the administrative rules regarding *how* good-time credits were earned would otherwise remain constant. Still less would a prisoner serving a lengthy sentence have any such expectation. Otherwise, why would the legislature delegate ministerial authority to implement regulations? The very purpose of allowing corrections officials (rather than the legislature) to set this policy is because these kinds of issues lend themselves to on-the-scene adjustments, which again are as apt to benefit inmates as frustrate them. True, this delegation of agency authority does not permit a regulation that itself imposes punishment, a development that would either implicate double

jeopardy or due process. But so long as the regulations fit within an appropriate delegation of ministerial authority, they do not violate *ex post facto*.

Even if the *amici* States are wrong on this point (which, we respectfully submit, they are not), that does not diminish the force of the petition. Quite to the contrary: In view of the Court's silence on this issue, the lower courts have long struggled to resolve it, with some courts adopting the position embraced by the Kansas Supreme Court and others adopting the position Kansas and the *amici* States have proposed. As Kansas points out in its petitions, several federal courts of appeals have held that administrative regulations do not violate *ex post facto*. *See, e.g., United States v. Ellen*, 961 F.2d 462, 465-66 (4th Cir.), *cert. denied*, 506 U.S. 875 (1992); *Bailey v. Gardebring*, 940 F.2d 1150, 1155-57 (8th Cir. 1991), *cert. denied, Bailey v. Noot*, 503 U.S. 952 (1992); *Francis v. Fox*, 838 F.2d 1147, 1150 (11th Cir. 1988). Nor has this conflict of authority gone unnoticed or (as this case confirms) been non-recurring. *See, e.g., Bailey v. Noot*, 503 U.S. 952 (1992) (White, J., dissenting from the denial of certiorari on the issue); *Dominique v. Weld*, 73 F.3d 1156, 1162 & n.10 (1st Cir. 1996).

In the end, the conflict of authority regarding the application of the *ex post facto* clause to administrative regulations supports the writ. On this basis alone, the writ should be granted.

II. The Lower-Court Decision Implicates A Matter Of Grave Importance To The States.

As this Court has long recognized, prison management represents a core sovereign function of the States. It "is difficult to imagine an activity in which a State has a stronger interest, or

one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-492 (1973).

Recognizing the integral nature of prison management to the States, the Court has been careful to reconcile the constitutional rights of prisoners with the flexibility prison administrators need to run their corrections systems. For this reason, in all constitutional cases, not just First Amendment cases, *see Turner v. Safley*, 482 U.S. 78 (1987) the Court has adopted a lower standard of review regarding constitutional claims by inmates. The decision to do so, the Court has reminded litigants, is

> based upon the need to reconcile our long-standing adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration. These two principles apply in all cases in which a prisoner asserts that a prison regulation violates the Constitution, not just those in which the prisoner invokes the First Amendment. We made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights.

Washington v. Harper, 494 U.S. 210, 223-224 (1990).

These considerations -- particularly the need to have flexibility in rehabilitating and securing prisoners -- have particular force here. Prison populations are expanding at unprecedented rates, having increased by more than 111 percent over the last six years. *Prisoners in 1997*, Bureau of Justice

Statistics Bulletin (Aug. 1998) at 4. Current statistics show that approximately 1100 new inmates are added to the nation's prisons each week, enough to fill almost two average-size prisons. *Id.* at 1, L. Greenfeld, A. Beck, and D. Gilliard; *Prisons: Population Trends and Key Issues for Management*, 21 Criminal Justice Review 4, 5 (1996). State prisons not surprisingly are operating at an average of 129% of capacity with a recent survey revealing that 39 states consider their overcrowding problems to be "serious," "very serious," or "critical." *Prisoners in 1997, supra* at 4; C. Hill, *Population Projections*, Corrections Compendium, Vol. 23, No. 5 (May 1998) at 15-17.

In addition to the growth in prison populations, States have had to address rapid changes in the composition and background of their inmates. There have been record increases in the number of violent offenders and prisoners affiliated with gangs, each presenting unique management challenges to corrections officials. *Prisoners in 1997, supra* at 11 (noting that violent offenders were responsible for 50% of the recent increase in overall prison population.); A. Beck, *supra* at 6, Table 7; C. Huff and M. Meyer, *Managing Prison Gangs and Other Security Threat Groups*, 1(4) Corrections Management Quarterly 10, 11 (1997). Growing numbers of prisoners, the statistics show, tend to commit new offenses when given access to supervised release. Greenfeld, Beck, and Gilliard, *supra* at 12; Beck, *supra* at 10-11. These trends are expected to continue and intensify. R. Wilkinson, *The Future of Adult Corrections*, 1(1) Corrections Management Quarterly 57 (1997); A. Beck, *supra* at 13. In recent years, prison wardens also have witnessed an unprecedented influx of female inmates and HIV-positive inmates, each requiring system-wide changes to prison management. *H.I.V. in Prisons and Jails*, Bureau of Justice Statistics (Aug. 1997); *Census of State and Federal Correctional Facilities*, Bureau of Justice Statistics Bulletin (Aug. 1997) at 1; Greenfeld, Beck, and Gilliard, *supra* at 18.

An increasing number of young inmates has created additional pressures of their own. A. Beck, *Growth, Change and Stability in the U.S. Prison Population, 1980-1995*, 1(2) Corrections Management Quarterly, 1, 4, 5, Table 5 (1997); C. Heard, *Forecasting Models for a Changing Inmate Population: Implications for Public Policy*, 18 Criminal Justice Review 1,2 (Spring 1993).

In view of these rapid changes in prison populations and in view of the penological challenges that come with them, it is particularly important that prison officials have flexibility to adjust their operating procedures to account for these developments. Yet rather than account for these challenges to prison management, the lower-court decision has exacerbated them.

At a specific level, the decision precludes frequently-needed refinement of one of the tested incentives for good behavior and rehabilitation -- good-time credits. Such programs, it has been recognized, provide essential motivation for good conduct and for prisoners to rehabilitate themselves in preparation for release:

> The actual allowance of 'good time' is discretionary and is awarded as an incentive for good conduct. It is a means for encouraging participation in programs, efficient work and discipline.
>
> The state correctional system seeks to encourage rehabilitation by work participation by inmates, job training programs and education programs. An inmate can be evaluated in his work and participation in the facility's programs and 'good time' granted as an incentive.

McGinnis v. Royster, 410 U.S. 263, 273 n.20 (1973). The decision below, however, prevents inherently-necessary modifications to good-time credits and thus interferes with an aspect of penal administration that this Court has recognized is best left to the discretion of corrections officials. *See Preiser v. Rodriguez*, 411 U.S. 475, 491-492 (1973).

At a more general level, the lower-court decision could have a potentially broader, more disruptive impact. Given the Kansas Supreme Court's emphasis on the "disadvantageous" effect of new regulations, the decision could well ossify operating procedures in other vital areas. In response to the ever-shifting dynamics of prison management, 80% of the states have altered their internal operating procedures since 1995 in ways that are arguably "disadvantageous" to prisoners. *Inmate Privileges*, Corrections Compendium, Vol. 23, No. 7 (July 1998) at 6. Those changes deal with such diverse matters as health care administration, property and entertainment privileges, smoking, occupational training and computer use, and DNA testing for criminal investigatory purposes. *Id.* at 7-8. In view of the arguably "disadvantageous" nature of those changes, they all could well be endangered by the lower-court decision. In each of these respects, the lower-court decision affects matters of significant federal import. This factor, too, independently supports the writ.

III. The Lower Court Erred.

Even aside from the conflict of authority heightened by the lower-court decision and the importance of the issues presented, the flaws in the decision by the Kansas Supreme Court by themselves support the writ. One analytical flaw in particular overrides all others -- the court's mistaken assumption that a sexual-abuse treatment program constitutes "punishment" under the United States Constitution.

After properly acknowledging that the *ex post facto* clause covers only "additional *punishment*" (Pet. 14a) (emphasis added), *see Collins v. Youngblood*, 497 U.S. 37, 41 n.2 (1990) ("the Court has consistently adhered to the view . . . that the *Ex Post Facto* Clause applies only to penal statutes"), the Kansas Supreme Court proceeded to characterize Kansas's rehabilitation program as punitive in nature. That is flatly wrong.

To start with, no *ex post facto* decision from this Court supports such a wide-ranging construction of punishment. All of the relevant cases invalidating changes in State law plainly contemplate new *punitive* measures. *See, e.g., Lynce v. Mathis*, 519 U.S. 433 (1997) (change in statute required reincarceration of inmates that had been released); *Miller v. Florida*, 482 U.S. 423 (1987) (change in statute required longer prison sentence); *Weaver v. Graham*, 450 U.S. 24 (1981) (change in statute required longer incarceration); *Lindsey v. Washington*, 301 U.S. 397 (1937) (change in statute required longer incarceration). The sensible requirement that individuals convicted of sexual-abuse crimes participate in treatment programs, whether in existence at the time the crime was committed or not, simply does not fall within the factual or legal parameters of these cases. The reason is straightforward: The decision to require inmates to participate in these new rehabilitation programs is self-evidently remedial in nature. A contrary decision would dramatically hamstring not just these progressive forms of treatment but would have the perverse effect of limiting many other similar programs as well. For example, if a prison may not pass a regulation requiring convicted sex offenders to participate in treatment programs, it is not clear that it could require inmates who are high school dropouts to take vocational or other educational courses. Surely the Constitution is not an adversary of such well-meaning programs.

Recent precedent concerning the double jeopardy clause is to the same effect. There, as here, State laws implicate the provision only if they are punitive, as opposed to remedial, in nature. *See Hudson v. United States*, 522 U.S. __, 118 S. Ct. 488, 493-95 (1997). There, as here, a program designed to treat, as opposed to incarcerate, a sexual offender does not violate the Constitution. *See Kansas v. Hendricks*, 521 U.S. 346 (1997). And there, as here, "whether a sanction constitutes punishment is not determined from the defendant's perspective" because otherwise virtually all government measures would be deemed punitive. *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 777 n.14 (1995).

Under the Kansas Supreme Court's decision, however, there are now two types of "punishment" under the United States Constitution -- one for double jeopardy purposes and one for *ex post facto* purposes. That cannot be the law. Surely the same limitation on punishments carries the same meaning throughout the individual-liberty guarantees of the Constitution. Thus, as the Court already indicated in *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995), the operative question is not the inmate-centric view adopted by the Kansas Supreme Court -- whether a change in law "disadvantages" the inmate. It is whether the law "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Id.* at 506 n.3. And, as the Court's holdings all make clear, the *ex post facto* clause (like the Constitution's other limits on punishment) does not limit a State corrections agency from imposing new remedial requirements on its inmates -- so long as they are neither punitive in design nor effect.

These considerations also support the writ. The Kansas Supreme Court's decision goes well beyond the punitive focus of this Court's *ex post facto* precedents and in the process creates a schism in the definition of "punishment" for *ex post facto* and for double jeopardy purposes. The Court should grant

review to correct this critical error and to prevent it from being exported to other States.

CONCLUSION

For the foregoing reasons, the *amici* States respectfully urge the Court to grant the writ.

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No. 98-366

In The

Supreme Court of the United States

October Term, 1998

DAVID R. McKUNE, WARDEN,
CHARLES SIMMONS, SECRETARY OF CORRECTIONS,

Petitioners,

v.

MARK L. STELTZLEN,

Respondent.

On Petition For A Writ Of Certiorari To The Kansas Court Of Appeals

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REASONS FOR GRANTING THE WRIT

I. Whether Ministerial State Prison Regulations Are "Laws" For *Ex Post Facto* Purposes Is An Unsettled And Important Issue Of Federal Law

The federal question whether ministerial, interpretive prison regulations should be considered "Laws" for constitutional *ex post facto* purposes is important but remains unsettled. Since *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), this Court has repeatedly emphasized that the constitutional *ex post facto* prohibitions apply to *penal statutes*. The Court has never addressed an *ex post facto* challenge to prison *regulations*.

Moreover, the two *ex post facto* provisions in our Constitution appear in Article I as limitations on *legislative* power. The court below, however, essentially held that all administrative regulations in Kansas necessarily are subject to *ex post facto* requirements, whether or not based on a delegation of legislative authority. With all due respect, petitioners urge this Court to grant review in this case or, alternatively, in the companion cases in No. 98-367, in order to address and resolve this important federal question.

A. This Court's Cases Repeatedly Suggest That Article I's *Ex Post Facto* Prohibitions Limit Only Legislative Abuses, *i.e.*, Penal Statutes Retroactively Applied

The proposition that the state *Ex Post Facto* Clause "has been interpreted to pertain exclusively to *penal statutes*," *Kansas v. Hendricks*, 521 U.S. 346, ___, 117 S. Ct.

2072, 2086 (1997) (emphasis added), goes all the way back to *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). In that early decision, the Justices emphasized that the constitutional prohibitions were designed to preclude abusive exercises of legislative power such as had occurred in England, Europe and, to a lesser extent, in some of the American states.[1] Thus, Justice Chase declared that "the plain and obvious meaning and intention of the prohibition is this: that the legislatures of the several states, shall not pass laws, after a fact done by a subject or citizen, which shall have relation to such fact, and shall punish him for having done it." *Id.* at 390; *see also Miller v. Florida*, 482 U.S. 423, 429 (1987) (observing that *Calder* "emphasized that the Clauses were aimed at preventing legislative abuses").

This history suggests a primary concern with legislative abuses of power. But "it is not a reason for treating parole guidelines as laws to which the rule against ex post facto laws applies." *Prater v. United States Parole*

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[1] Justice Chase, for example, observed that the prohibitions against *ex post facto* laws "very probably arose from the knowledge, that the parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties. . . . " 3 Dall. at 389. Justice Iredell dramatically declared that the "history of every country in Europe will furnish flagrant instances of tyranny exercised under the pretext of penal dispensations. * * * The temptation to such abuses of power is unfortunately too alluring for human virtue; and therefore, the framers of the American constitutions have wisely denied to the respective legislatures, federal as well as state, the possession of the power itself: they shall not pass any *ex post facto* law. . . . " *Id.* at 399-400.

Commission, 802 F.2d 948, 953 (7th Cir. 1986) (en banc) (Posner, J.).

Certainly, state legislatures may delegate legislative authority to prison officials. And the regulations prison officials adopt pursuant to such legislative delegations may well fall within the historical reach of the *ex post facto* prohibitions. But it does not follow that *every* prison regulation that adversely affects some inmates in some way is subject to *ex post facto* scrutiny.

B. The Lower Courts Are Divided On The Importance And Application Of The Distinction Between Regulations Based On Delegated Legislative Authority And Ministerial, Interpretive Regulations

Contrary to respondent's suggestion, petitioners are not asserting that prison regulations promulgated pursuant to delegated legislative authority can never be "Laws" for *ex post facto* purposes. Indeed, as respondent suggests, such a position would permit the state to evade *ex post facto* limitations in the prison context by the simple expedient of making a broad delegation of legislative authority to the department of corrections. Or, in the federal system, Congress could simply delegate legislative authority to establish criminal punishments to a body such as the United States Sentencing Commission.

Recognizing that proposition, however, does not resolve this case, nor does it eliminate the well-established split of authority in the lower courts. Rather, respondent concedes "that the determination of *when* an administrative regulation constitutes a 'law' for Ex Post

Facto purposes may not always be crystal clear," Opp. 7 n. 2, and "we have no dispute that the question of *when* such a regulation is a law is less settled." *Id.* at 10. Indeed, this issue is potentially determinative in this case and it is the very issue that has divided the courts.

For example, after pointing out that "[t]here is some disagreement among the circuits on this matter," *Dominique v. Weld*, 73 F.3d 1156, 1162 (1st Cir. 1996), the First Circuit observed that "[t]he dispute appears to turn on whether a rule is legislative (based on a delegation of statutory authority) or merely interpretive, and whether a legislative rule is binding or merely guides the exercise of discretionary power." *Id.* at 1162 n. 10 (citing and discussing cases). Chief Judge Posner has observed that "[t]he rule against ex post facto laws applies to statutory changes and also (we may assume) to changes in administrative regulations that represent an exercise of delegated legislative authority, as opposed to an interpretation of legislation by an agency authorized to execute, not make, laws." *Prater v. United States Parole Commission*, 802 F.2d 948, 953-54 (7th Cir. 1986) (en banc) (Posner, J.). *See also Ewell v. Murray*, 11 F.3d 482, 487 n. 2 (4th Cir. 1993) (discussing split of authority).

Although this Court has never directly addressed the question of which prison regulations may constitute "Laws" for *ex post facto* purposes, it has acknowledged the distinction between legislative and interpretive rules in this context. In *Miller v. Florida*, 482 U.S. 423, 434 (1987), the Court observed that several Courts of Appeal had upheld federal parole regulations against *ex post facto* challenge, relying on the following three rationales: (1) federal parole guidelines are not "laws" for *ex post facto*

purposes; (2) the parole guidelines merely "rationalize the exercise of statutory discretion"; and (3) retrospective application of the parole guidelines does not result in a more onerous punishment. *Id.* at 434-35. The Court then discussed these rationales in *Miller* (involving a change in Florida's sentencing guidelines) but concluded that "[n]one of the reasons given in the federal parole cases even arguably applies here." *Id.* at 435.

With all due respect, as discussed in the petition for writ of *certiorari* in No. 98-367, at pages 24-25, all three of the foregoing rationales apply to the Kansas regulations.

C. Whether A State Prison Regulation Is A "Law" For Constitutional *Ex Post Facto* Purposes Necessarily Is A Federal Question

Respondent's brief does not make clear whether he views the question in this case as one of federal or state law. *See* Opp. 10-11. But he suggests that it be answered as a matter of state law, asserting that "prudential considerations argue for deference to the State's own characterization of its administrative rules." Opp. 10. This cannot be correct.[2]

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[2] Even were the Court to adopt this approach, it is not clear the issue is so clear cut as respondent suggests. Although the state court of appeals concluded that administrative regulations have the force of law, it does not follow that all such regulations are necessarily legislative in character, as opposed to interpretive or ministerial. Indeed, the prison regulations themselves require only that, for parole eligibility and conditional release purposes, prison officials apply the "statutes" in effect at the time of an inmate's crime. K.A.R.

Taken literally, respondent's suggested approach – defer to the State's characterization of its administrative regulations – could permit a state court, legislature or perhaps even department of corrections to declare that all of the state's prison regulations are purely ministerial or interpretive. Apparently, under respondent's approach, the courts would defer to this declaration, as suggested by respondent's discussion (and apparent approval) of a Kansas statutory provision that purportedly exempts "hundreds of pages" of prison manuals from *ex post facto* scrutiny. Opp. 11. With all due respect, it seems doubtful that respondent really desires a rule that would permit the Kansas legislature in its next session to eliminate the potential for virtually all future *ex post facto* litigation involving Kansas prison regulations.

II. Like The Court Below, Respondent Fails To Acknowledge Or Address This Court's *Ex Post Facto* Decisions Limiting And Disagreeing With *Weaver v. Graham*, 450 U.S. 24 (1981)

Although respondent concedes that the lower court "relies heavily upon *Weaver*," Opp. 12, respondent neither mentions nor addresses important *ex post facto* decisions that limit *Weaver*. Respondent observes that neither *Weaver* nor *Lynce v. Mathis*, 519 U.S. 433 (1997), "provoked even a single Justice to dissent," Opp. 13, but fails to

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44-6-107(a). They make no mention of applying *regulations* in effect at the time of an inmate's crime. Arguably, this regulation suggests that prison officials view these regulations as interpretive or ministerial rather than the result of a delegation of legislative authority.

acknowledge that at least two Justices reluctantly accepted the outcome in each of those cases and disagreed with the Court's reasoning, as discussed in the petition for a writ of *certiorari* in No. 98-367, at pages 25-28. Moreover, respondent ignores that this Court in *Collins v. Youngblood*, 497 U.S. 37 (1990), and *California Dept. of Corrections v. Morales*, 514 U.S. 499, 506 n. 3 (1995), expressly rejected the *Weaver* court's discussion of the concept of "disadvantage." *Cf. Portley v. Grossman*, 444 U.S. 1311, 1312 (1980) (Rehnquist, J., in chambers) ("the prohibition of ex post facto laws does not extend to every change of law that 'may work to the disadvantage of a defendant.' ") (quoting *Dobbert v. Florida*, 432 U.S. 282, 293 (1977)).[3] *Ex post facto* issues are of great importance to the States, with the States' ever-increasing prison populations. *See* Brief *Amici Curiae* of Ohio, et al. in Nos. 98-366, 98-367 (36 states supporting request for review of these important *ex post facto* issues).

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[3] A Westlaw Insta-Cite check of both *Weaver* and *Lynce* confirms that the lower state and federal courts have struggled in applying these decisions. For example, a check of *Weaver* reveals 18 decisions – from this Court, the Courts of Appeal, and the state courts – that have declined to extend *Weaver* or distinguished it, recognizing that this Court's subsequent decisions have, at least in part, abrogated, disagreed with, called into doubt, or modified *Weaver*. A similar check of *Lynce* reveals that, even though the case was decided less than two years ago, one federal Court of Appeals already has declined to extend it, and six other decisions have distinguished it. For the Court's convenience, this information is included as an appendix to this reply brief.

III. This Case And The Related Cases In No. 98-367 Provide Appropriate Vehicles For This Court To Address These Important, Unresolved *Ex Post Facto* Issues

With all due respect, respondent's suggestion that this case is not an appropriate vehicle by which to address the *ex post facto* issues is without merit. The issues are cleanly raised in this case, and the lower court thoroughly addressed them. Respondent is represented by capable counsel with substantial experience in litigation involving prison inmates and prison issues. And, in addition to Kansas, 36 states have expressed their support for review of these cases to resolve the important *ex post facto* issues they raise.

Nor does respondent's suggestion that the companion cases in No. 98-367 are not appropriate vehicles have merit. In those cases, like this case, the issues are cleanly raised and expressly decided. Although the cases in No. 98-367 also deal with changes in the withholding of good time credits for failure to participate in the Sexual Abuse Treatment Program, that fact may simply counsel in favor of granting those cases (to address all of the issues raised) and holding this petition for disposition pending the outcome.

CONCLUSION

For the foregoing reasons, the reasons stated in the petition and the reasons set forth in the amicus brief filed by Ohio on behalf of 36 states supporting review of these issues, petitioners respectfully request that this Court

grant the petition for a writ of *certiorari* in order to resolve the splits of authority in the lower federal and state courts. In the alternative, petitioners request that the Court grant the petition in No. 98-367, which raises the identical issues, and hold this case for disposition pending the outcome of No. 98-367.

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APPENDIX
(Results Of Insta-Cite Checks)

***Weaver v. Graham*, 450 U.S. 24 (1981):**

Cases Not Following *Weaver* Dicta

California Dept. of Corrections v. Morales, 514 U.S. 499 (1995)

Cases Recognizing Abrogation Of *Weaver*

United States v. Brechtel, 997 F.2d 1108 (5th Cir. 1993)

State ex rel. Glover v. State, 660 So.2d 1189 (La. 1995)

United States v. Pedrazoli, 45 M.J. 567 (A.F. Ct. Crim. App. 1997)

Amin v. State, 939 P.2d 413 (Alaska App. 1997)

Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997)

Allen v. State, 945 P.2d 1233 (Alaska App. 1997)

Cases Recognizing Disagreement With *Weaver*

Snyder v. State, 965 S.W.2d 121 (Ark. 1998)

Stewart v. Pennsylvania Bd. of Probation and Parole, 714 A.2d 502 (Penn. 1998)

Cases Suggesting *Weaver* Has Been Called Into Doubt

Jones v. Georgia State Bd. of Pardons and Paroles, 59 F.3d 1145 (11th Cir. 1995)

People v. Superior Court, 57 Cal. Rptr.2d 296 (Cal. App. 1996)

Cases Declining To Extend *Weaver*

Hock v. Singletary, 41 F.3d 1470 (11th Cir. 1995)

Hallmark v. Johnson, 118 F.3d 1073 (5th Cir. 1997)

Cases Distinguishing *Weaver*

Ellis v. Norris, 968 S.W.2d 609 (Ark. 1998)

Cases Recognizing *Weaver* Has Been Modified

United States v. Brady, 88 F.3d 225 (3d Cir. 1996)

Puckett v. Abels, 684 So.2d 671 (Miss. 1996)

People v. Fioretti, 63 Cal. Rptr.2d 367 (Cal. App. 1997)

Fletcher v. Williams, 688 N.E.2d 635 (Ill. 1997)

Stansbury v. Hannigan, 960 P.2d 227 (Kan. 1998)

***Lynce v. Mathis*, 519 U.S. 433 (1997):**

Cases Declining To Extend *Lynce*

Hallmark v. Johnson, 118 F.3d 1073 (5th Cir. 1997)

Cases Distinguishing *Lynce*

Alan A. v. Verniero, 970 F. Supp. 1153 (D.N.J. 1997)

Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997)

State v. Woodman, 1997 WL 710652 (Ohio App. 1997)

Wilson v. State, 1998 WL 13817 (Tenn. App. 1998)

Wottlin v. Fleming, 136 F.3d 1032 (5th Cir. 1998)

Beasley v. Commissioner of Correction, 50 Conn. App. 421 (1998)